

# Thoughts of a Chief Circuit Mediator on Federal Court-Annexed Mediation

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Today, I am invited to answer questions posed by the Symposium concerning the "institutionalization" of mediation in the federal courts, particularly at the appellate level, twenty-five years after the Pound Conference.<sup>1</sup> More specifically, I am asked to address issues and methods for assuring quality in a staff mediation program, based on our experience in the Sixth Circuit. The questions posed by the Symposium relate to mediator qualifications, training, supervision, and evaluation. I accept this invitation with the hope that better understanding of the challenges and opportunities of providing mediation through court staff mediators will assist judges and administrators who may wish to experiment with this model in other courts.

## I. INTRODUCTION

When the Sixth Circuit decided to start its Pre-Argument Conference Program<sup>2</sup> in 1981, appellate court-based mediation was almost unheard of.<sup>3</sup>

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<sup>1</sup> The Pound Conference is generally regarded as an historical focal point of public recognition by legal scholars and judges of the need for less formal, faster, and less expensive methods for resolving many types of disputes. Address Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7-9, 1976), in 70 F.R.D. 79 (1976).

<sup>2</sup> Initially, the program was called the Pre-Argument Conference Program and the mediators were called conference attorneys. The court's original enabling rule provided that, "A circuit judge or conference attorney may direct the attorneys for all parties to attend a pre-argument conference, in person or by telephone, to be held as soon as practicable after the filing of the pre-argument statement. Such conference shall be conducted by the conference attorney or a circuit judge designated by the chief judge, to consider the possibility of settlement, the simplification of the issues, and any other matters which the circuit judge or the conference attorney determines may aid in the handling of the disposition of the proceedings." 6TH CIR. R. 18(c)(2). In 1996, the name of the program was changed to the Office of the Circuit Mediators, and the conference attorneys thereafter were called circuit mediators.

<sup>3</sup> Other than the Second Circuit's Civil Appeals Management Plan (CAMP), the Author is unaware of any other state or federal appellate settlement or mediation programs in existence at the time the Sixth Circuit started its program. For other references tending to confirm this view, see ANTHONY PARTRIDGE & ALLEN LIND, FED. JUDICIAL CTR., A REEVALUATION OF THE CIVIL APPEALS MANAGEMENT PLAN 13 (1983),

As brand new court mediators,<sup>4</sup> we began immediately sending short questionnaires to every lawyer at the end of our involvement in every case, eager to know what they thought about this new event in their appellate process. The first question was, "Do you think a settlement program of this type is appropriate in a federal court of appeals?" I was not altogether sure what I thought about this myself. This was, after all, the apex of the formal adversarial legal system; these were the courts that wrote the decisions lawyers studied with reverence in law school, the courts of last resort in ninety-nine percent of all federal appeals.<sup>5</sup> Now, the court was inviting lawyers and litigants in all types of cases into private, off-the-record, informal discussions—often in *ex parte* caucuses. Through its mediators, it was encouraging resolutions based on underlying interests that might be extraneous to the best legal arguments and through a process that recognized feelings as an important factor in the considerations. To my surprise, the answer to the first survey question was unequivocally and universally "yes," as long as the settlement discussions are confidential.<sup>6</sup> That was six years after the Pound Conference.

Today, every federal circuit court except the Federal Circuit has a mediation program.<sup>7</sup> All use staff mediators. All but two use exclusively staff mediators.<sup>8</sup> Most programs are structured and operate similarly to the Sixth

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and ROBERT J. NIEMIC, FED. JUDICIAL CTR., *MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS: A SOURCEBOOK FOR JUDGES AND LAWYERS* 3 (1997).

<sup>4</sup> The Author was hired in November 1981. By January 1982 another mediator and secretary were hired. A third mediator was added in late 1982, and a fourth in 1987.

For an early history of the formation of the Sixth Circuit's program, including the reasons and assumptions underlying its creation, see generally Robert W. Rack, Jr., *Pre-Argument Conferences in the Sixth Circuit Court of Appeals*, 15 U. TOL. L. REV. 921 (1984). For more information about the development of the Program and its administrative policies, see JAMES A. HIGGINS & ROBERT W. RACK, JR., *HISTORY OF THE PRE-ARGUMENT CONFERENCE PROGRAM* (1988) (on file with author), and JAMES B. EAGLIN, FED. JUDICIAL CTR., *THE PRE-ARGUMENT CONFERENCE PROGRAM IN THE SIXTH CIRCUIT COURT OF APPEALS: AN EVALUATION* 11-22 (1990).

<sup>5</sup> The United States Supreme Court granted certiorari in 212 cases in 1981, which was 0.24% of all circuit court terminations for that year. ADMIN. OFFICE OF THE U.S. COURTS, *THE UNITED STATES COURTS: A PICTORIAL SUMMARY FOR THE TWELVE MONTH PERIOD ENDED JUNE 30, 1982*, at 1 (1982).

<sup>6</sup> See HIGGINS & RACK, *supra* note 4, at 2 for a summary of these survey results.

<sup>7</sup> For a thorough description of each circuit's program, see NIEMIC, *supra* note 3, at 102. The Federal Circuit requires litigants to discuss settlement but offers no assistance and does not require the involvement of a third-party neutral. *Id.*

<sup>8</sup> The D.C. Circuit primarily uses lawyer volunteers as its mediators, though program staff do mediate some cases. Conversation with Nancy Stanley, Director of Dispute Resolution Programs, D.C. Circuit (Dec. 19, 2001). In the Third Circuit, Senior Circuit Judges and Senior District Court Judges mediate about twenty percent of the cases—the rest are mediated by the Circuit's Chief Mediator/Program Director.

Circuit's.<sup>9</sup> Although some have reorganized, no program in the last twenty years has disbanded or cut back, and most have expanded.<sup>10</sup> The United States Judicial Conference has strongly and consistently supported these programs over the years, even protecting them from judiciary-wide staffing limitations,<sup>11</sup> presumably because they have recognized significant value of the programs to their courts. Indeed, a three year control-group study of one circuit program showed it was highly cost effective compared to the additional judges it would have taken to decide the settled cases,<sup>12</sup> and in 1993 the Judicial Conference Judicial Resources Committee ordered that no new judgeship requests would be considered from courts of appeals that did not have a mediation program in place.<sup>13</sup> Thus, at the appellate level, mediation in the federal courts appears to be institutionalized.

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Conversation with Joe Torregrossa, Director of Appellate Mediation Program, Third Circuit (Dec. 19, 2001).

<sup>9</sup> NIEMIC, *supra* note 3, at 5–16. Common characteristics of most programs are that the mediation offices schedule and initiate confidential settlement conferences for parties and/or their counsel shortly after the notice of appeal, before briefing, in most types of fully counseled civil cases, excluding prisoner appeals. Conferences also may be requested by parties or suggested by judges in particular cases and are provided at no cost to litigants. Attendance in most programs is required, though settlement obviously is not. Most programs try to accommodate litigants' scheduling needs and many use telephone conferences. The mediation style for most is facilitative.

<sup>10</sup> Nationwide, the number of authorized mediator positions began growing slowly but steadily after a ten year hiring freeze was lifted in 1994. The number grew from eleven in 1993, to 46.5 in 2000. Interview with Gloria Malkin, Administrative Office of the United States Courts (Dec. 20, 2001).

<sup>11</sup> As a national budget cutting measure, through most of the 1990s all federal judiciary staff budgets were reduced to eighty-four percent of their usual funding level. Only the circuit mediation offices were exempted. JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (1995).

<sup>12</sup> After accounting for cases that would have settled even without program intervention, a Federal Judicial Center evaluation of the Sixth Circuit's program found that the program was disposing of as many cases as would an additional 1.06 appellate judges. EAGLIN, *supra* note 4, at 6. At that time, the total cost to operate the mediation program, including among other things salaries and rent, was approximately \$194,000 (on file with the Sixth Circuit's Circuit Executive's Office). The total cost to maintain one appellate judge with chambers and staff in 1986 was not available from the Budget Division of the Administrative Office (A.O.), but the A.O.'s reported annual costs to maintain a circuit judgeship in January, 1992, the earliest date for which the author could obtain data, was \$656,000 (on file with author).

<sup>13</sup> Report of the Judicial Conference Committee on Judicial Resources 2–3 (Sept. 1994) (on file with author).

Mediation at the district court level has been a somewhat different story. Following several nudges by Congress over the last decade toward greater use of alternative dispute resolution (ADR),<sup>14</sup> most district courts now report having some kind of ADR program. Information about how often many of them are used has been sketchy.<sup>15</sup> Some have named their magistrate judges as their program mediators, and some refer litigants to members of the bar who volunteer as mediators or to private mediators whom the parties must pay.<sup>16</sup> Despite twenty-eight years<sup>17</sup> of federal appellate court experience with staff mediation, this model seems to go largely unexamined and unreplicated in federal trial courts.<sup>18</sup> The reasons are unclear. In-house mediation programs can appear to be more expensive to implement than volunteer and magistrate judge programs, or programs that refer litigants out to private mediators for a fee, since hiring a mediator adds a new direct cost to a court's budget; however, closer inspection of the costs and productivity of the different types of programs challenges some of those appearances.<sup>19</sup>

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<sup>14</sup> The Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended at 28 U.S.C. §§ 471-482 (1994 & Supp. V 1999)) strongly encouraged federal district courts to adopt more ADR programs and provided funding for pilot projects. The Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (codified at 28 U.S.C. §§ 651-658 (Supp. 1998)) mandated that all district courts adopt ADR programs, encouraging mediation programs in particular, and favorably mentioning the appellate court programs. 28 U.S.C. § 652. And in 1999, following his Subcommittee's two and a half years of hearings, Senator Grassley actually praised the federal judiciary for its mediation programs and described the appellate programs in detail. U.S. SENATE JUDICIARY SUBCOMM. ON ADMIN. OVERSIGHT & THE COURTS, 106TH CONG., CHAIRMAN'S REPORT ON THE APPROPRIATE ALLOCATION OF JUDGESHIPS IN THE UNITED STATES COURTS OF APPEALS 10-11 (Comm. Print 1999).

<sup>15</sup> ELIZABETH PLAPINGER & DONNA STIENSTRA, FED. JUDICIAL CTR. & THE CPR INST. FOR DISPUTE RESOLUTION, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS 36-49 (1996). Information about the number of cases referred for mediation was "unknown" or "not yet available" for sixteen of the fifty-one districts reporting mediation programs.

<sup>16</sup> *Id.*

<sup>17</sup> The Second Circuit, regarded as the first circuit mediation program, started its Civil Appeals Management Plan in 1974. *See* NIEMIC, *supra* note 3, at 24.

<sup>18</sup> At this time, only four district courts are known to be using staff mediators: District of Columbia, District of Rhode Island, Northern District of California, and Western District of Missouri. Interview with Donna Stienstra, Senior Research Associate, Federal Judicial Center (Dec. 19, 2001).

<sup>19</sup> The salary costs alone for a typical appellate mediator with an administrative assistant range from \$125,922 to \$191,002. Contrasted with this, many district courts now designate an existing administrative staff person to coordinate their volunteer and referral programs or refer cases to a magistrate judge for settlement conferences, all at relatively little additional direct cost. On the other hand, a magistrate judge doing full-time mediation would cost more than a staff mediator, since magistrate judges are paid

Moreover, staff mediation programs offer courts and litigants a variety of other benefits, including a high degree of confidence in the neutrality of the mediator, high quality mediation for litigants regardless of their ability to pay, full-time and immediate availability of mediators to litigants and judges, and the dignity and confidence of the court setting.<sup>20</sup> Nonetheless, neither Congress, through the ADR Act of 1998, nor the United States Judicial Conference, through its funding formulas, provides money for district courts to hire staff mediators.<sup>21</sup>

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more. Also, well-administered volunteer programs are not necessarily cheap. The D.C. Circuit Court program, for example (which also serves the D.C. District Court), employs two full-time professional staff to coordinate recruitment, training, and support of 240 volunteer lawyer mediators. Interview with Nancy Stanley, Director of Dispute Resolution Programs, U.S. Court of Appeals, D.C. Circuit (Dec. 2001). In light of the high volume of cases that a full-time staff mediator can handle (each Sixth Circuit mediator, for example, mediates between 200 and 250 cases per year of which forty to forty-five percent settle), compared to the volume reported by some volunteer programs (the D.C. program, for example, reported a total of 270 district and appellate cases mediated with a forty-two to forty-six percent settlement rate in 2000), staff programs might compare favorably with well-administered volunteer programs in terms of the number of cases that can be mediated and settled per dollar. *Id.*

<sup>20</sup> For a thoughtful and thorough analysis of these and other benefits of staff mediators vis-a-vis other mediation delivery models, see Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715 (1999) (identifying and discussing important values of ADR programs, and comparing the five most common ways to structure a court-connected mediation program).

<sup>21</sup> In 1998, the Judicial Conference approved a staffing factor for district clerks' offices to "ensure that, with the sunset of the Civil Justice Reform Act, resources would continue to be available to support *well-established* ADR programs in district courts." Interview with David Williams, District Court Administration Division, Administrative Office of the United States Courts (Jan. 2002) (emphasis added). Thus, a court must already have a functioning, successful program to qualify for funding. Even if a district court could somehow find the resources to start a program that would subsequently qualify for funding, the formula provides insufficient funding to support a staff mediator with clerical support and facilities. Under the Conference's formula, if an existing program mediated 225 cases, approximately the average number of cases handled by each Sixth Circuit mediator, the court could receive enough funding the following year for twenty-eight percent of a mid-level, non-supervisory clerical position. *See id.* Courts that can demonstrate more intense involvement with their ADR cases may be designated "robust" courts and benefit from a more generous formula that still would not cover the salary of a single mediator. *Id.* It is noteworthy also that eight of the nine district programs designated as "robust" previously received outside funding under the Civil Justice Reform Act, Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended at 28 U.S.C. §§ 471-482 (1994 & Supp. V. 1999)), the Judicial Improvements and Access to Justice Act, Pub. L., No. 100-702, Title IX, § 901(a) (1988) (codified at 28 U.S.C. §§ 651-658 (Supp. V 1999)), or both. Neither of these outside funding sources is

There may be concern among some judges that ADR is reducing their adjudicatory role. Federal judiciary statistics indicate that the percentage of district court civil cases that settle or voluntarily dismiss has risen from 11.2% in 1981 (the year the Sixth Circuit started its program) to forty-eight percent now,<sup>22</sup> and the number of federal civil trials has dropped approximately thirty-six percent in the last five years.<sup>23</sup> These changes seem to suggest wider public acceptance of less adversarial methods of resolving formal legal disputes. The still-open question is whether and how courts, as the public institutions responsible for resolving disputes, should and will adapt to these changes, and to the ADR Act of 1998's urging of federal district courts to provide alternatives like mediation. A variety of models by which courts are doing so have been identified, ranging from requiring parties to find and pay for private mediation outside the court, to providing mediation as a function of the court just as hearings and trials are provided now.<sup>24</sup> The rest of this Article describes some of the Sixth Circuit's experience and practice implementing the latter approach, and some of my personal conclusions derived from my experience as the court's Chief Circuit Mediator.

## II. MEDIATOR QUALIFICATIONS

What should a court look for in selecting a mediator? Because the subject matter and context of most appellate mediation is heavily law based, all mediators in this court are required to have a law degree and good legal analytical skills. This requirement is universal across federal appellate

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available any longer, and the Author knows of no others from which a district court could seek money to start a program.

<sup>22</sup> Federal Court Management Statistics for 1981 show that 11.2% of all 1981 district court civil case terminations in the types of cases typically eligible for inclusion in the appellate mediation programs (all civil cases listed in Table C-4 minus social security cases and prisoner petitions) were terminated voluntarily—that is, under the termination categories of “settlements,” “voluntary dismissals,” “want of prosecution,” and “consent decrees.” In 2000, voluntary terminations (using the same termination categories and case types) comprised forty-eight percent of all terminations. It should be noted that most of the increase occurred between 1986 and 1990. The reasons for this concentration are not clear and warrant further investigation. Interview with Statistics Division of the Administrative Office of the United States Courts (July 2001).

<sup>23</sup> The Statistics Division of the Administrative Office of the United States Courts reports the number of civil trials dropped from 10,155 in 1997 to 6513 in 2001. Interview with Statistics Division of the Administrative Office of the United States Courts (July 2001).

<sup>24</sup> Robert Rack & Nancy H. Rogers, *Introduction: Symposium on the Structure of Court-Connected Mediation Programs*, 14 OHIO ST. J. ON DISP. RESOL. 711, 712 (1999).

mediation programs.<sup>25</sup> In the Sixth Circuit, all other education, experience, and training qualifications are negotiable. Our position announcements call for “proven exceptional ability to manage collaborative problem solving and consensus building processes . . . in highly competitive situations.”<sup>26</sup> What this office seeks first and foremost in a candidate is an inclination and an ability to see value and similarity of interests in apparently conflicting points of view, and to seek integration or synthesis of valid perspectives rather than dominance by any one of them. We look for life and work experience that demonstrates intelligence and skill in working with people in conflict in a way that brings about the kind of integration or synthesis just mentioned. While court mediation offices undoubtedly tend to look first at candidates with litigation backgrounds, a background in business or politics might be just as useful. These qualities are almost impossible to quantify or apply as objective qualifications. They are found between the lines in resumes, in candidates’ interviews, and in probing reference checks. Our experience is that a person so oriented, who also has demonstrated initiative, emotional maturity, good judgment, exceptional interpersonal communications and social skills, integrity, and success with previous endeavors, is likely to become an excellent mediator. Mediator positions at the Sixth Circuit are potentially and typically career positions,<sup>27</sup> so hiring people for their high potential makes sense. Also, mediators in this office quickly get a great deal of experience,<sup>28</sup> so if the core qualities of a good mediator as described are present, the person can be expected to develop quickly into a highly-skilled mediator. Litigation and federal court experience, prior mediation training, and prior mediation experience are all valuable, but are considered less critical than the personal qualifications just described. To the best of my knowledge, there still are no specific objective education, training, experience, or subject matter expertise criteria that have been shown to predict high quality or success in mediators. Thus, rigid application of qualifications based on such criteria probably only creates a false sense of security and makes the selection process easier and faster; it will not assure

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<sup>25</sup> Robert W. Rack, Survey of Appellate Court Mediation Offices (Dec. 2001) (unpublished manuscript, on file with author). In preparation for this Article, the Author informally surveyed officials in all twelve appellate programs to determine the similarity of some of their practices with the practices of the Sixth Circuit.

<sup>26</sup> This or similar language has been used in position announcements for the last ten years.

<sup>27</sup> Mediators in the federal appellate courts are hired as high-level judiciary employees equivalent to JSP Grade 15 or 16. In twenty years, only three mediators have left the Sixth Circuit. Two of those now work in a mediation office in another federal circuit court.

<sup>28</sup> Full time mediators in the Sixth Circuit typically mediate 200 to 250 cases a year.

high quality mediation and might, in fact, cause a court to exclude its best candidate. This approach of hiring for personal qualities, or mediation talent, more than any specific training or experience, is not universal across the circuits, but has been the approach in three quarters of them.<sup>29</sup>

### III. TRAINING

Mediator training in a court program serves several important purposes. First, and most obviously, it shortens the new mediator's learning curve with respect to proven efficiencies and efficacies of certain mediation procedures, techniques, and styles. It also facilitates uniformity in the way the court's mediations are organized and conducted. Whether substantive<sup>30</sup> or procedural,<sup>31</sup> standardized practices can be useful in giving predictability and a sense of comfortable familiarity to the bar and in permitting more efficient management of the program's operations. Finally, in-house training provides a new mediator with understanding of the procedures and sensibilities of the court. This is extremely important in a court-based program and warrants further discussion.

As discussed below, court mediation offices necessarily operate with a high degree of autonomy from judges and most other court staff offices. At the same time, their work often affects and is affected by case processing decisions throughout the court. For example, our office typically controls briefing schedules, routinely giving briefing extensions to accommodate active negotiations,<sup>32</sup> and frequently interacts with the clerk's office regarding procedural motions in cases that are active in mediation. We also coordinate with the court's motions attorneys and staff attorneys to avoid actions that would duplicate or interfere with each others' work in a

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<sup>29</sup> Rack, *supra* note 25.

<sup>30</sup> For example, our mediators' clear and uniform articulation of the program's confidentiality policy, especially as it extends the court's confidentiality rule, standardizes the program's expectations and the parties' commitments regarding this important feature of mediations in the Sixth Circuit.

<sup>31</sup> Standardized procedures allow support staff to handle many administrative matters, including some potentially sensitive ones, such as scheduling and rescheduling of cases, responding to requests to substitute counsel, and processing briefing extensions and various types of case terminations, all routinely and without need for close supervision.

<sup>32</sup> Technically, the authority to modify briefing schedules is delegated from the court to the clerk. The court's rule authorizes "the circuit judge or the clerk of this court at the behest of the mediation attorney [to] enter an order or orders controlling the course of the proceedings." 6TH CIR. R. 33(d). In practice, for the sake of efficiency, the Mediation Office directly enters briefing extensions in cases actively engaged in mediation when all parties and the mediator agree they are warranted.



particular case.<sup>33</sup> Most readers will appreciate the potential for administrative, territorial sensitivities inherent in this kind of coordination, particularly for an office that must keep its own work confidential. We also interface with judges and panels of the court when mediating cases assigned to hearing panels. This can occur when counsel request last-minute mediation assistance just before or just after oral argument, or when judges request that we inquire about the possibility of settlement in cases pending before them. Each of these latter situations can be extremely sensitive and requires adherence to carefully crafted procedures to avoid inappropriate disclosures or disruption of the panels' work.<sup>34</sup> Perhaps most critical, however, is the need for the mediator to learn how to wear the court's mantle. No matter how high the confidentiality wall is between the mediators and the judges of the court, and no matter what assurances the mediators give participants that they do not speak for the court and cannot predict what the court will do in any particular case, the mediators still are seen as representatives of the court—as indeed they are. The respect, authority, and credibility this status confers on a mediator greatly strengthens his or her ability to manage complex discussions, especially emotionally charged ones, and to help people see the merit in different points of view, especially people whose vision may be impaired by adversarial zeal. This mantle must be worn very gently. Any inappropriate assumption of authority or abuse of power by a mediator would be likely to reduce participants' trust in the mediator's neutrality and could embarrass or offend the court as an institution. In the end, neither of these outcomes would serve anyone's interests.

Because this office has the luxury of a budget that allows it to send new mediators to the best outside training available, previous mediation training does not need to be an absolute prerequisite for hiring. Three of the five

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<sup>33</sup> For example, typically the mediation office does not schedule cases until the motions attorneys have completed an initial screening for jurisdiction. Occasionally, the motions attorneys might delay processing of a motion in a case until active negotiations are complete or will advise the mediators of recently filed motions of which the mediators might otherwise be unaware. Overlapping work between the mediators and the court's staff attorneys is rare since the mediation program focuses its efforts on fully-counseled substantive civil appeals, while historically most cases addressed by the staff attorneys have involved pro se and prisoner appeals, which generally are exempt from the mediation program. Coordination among offices is facilitated by a notation of the mediation office's involvement in a case on the court's computerized docket.

<sup>34</sup> For example, communicating with a panel about the status or likelihood of settlement of one of its cases, so the judges can decide whether to delay work on or issuance of an opinion in that case, must be done without disclosing the parties' settlement interests or positions, the issues dividing them, or anything else that could affect a judge's view of an issue or a party. As a safeguard, these types of communications often are conducted in writing.

current Sixth Circuit mediators were hired with no formal mediation training or experience. Only two of the twelve circuits consider prior formal training a prerequisite for hiring, and only three say they will not hire anyone without prior mediation experience.<sup>35</sup> Once selected, new Sixth Circuit mediators are registered for a forty hour interest-based negotiation or mediation course as soon as possible.<sup>36</sup> In the meantime, they spend most of their time preparing for and participating in mediations with the Chief Circuit Mediator and other experienced mediators in the office. By reading district court opinions and appellate decisions bearing on upcoming cases, they begin to gain familiarity with the Circuit's most common types of cases and the applicable case law. They also start learning the rules and procedures of this Court and the Mediation Office. Acclimating the new mediator to the role of an appellate court mediator and to the interests of the institution takes time and is extremely important. This apprenticeship orientation process typically lasts a month or two. It evolves in stages as the new mediator takes on cases of his or her own, which the Chief Circuit Mediator observes or co-mediate. Co-mediation can be somewhat awkward<sup>37</sup> and typically does not last long. New mediators will continue to debrief with the Chief Circuit Mediator or another experienced mediator after their conferences, and often before follow up calls, for as long as they find it useful.

In most respects, training is ongoing. In addition to occasional formal outside training programs,<sup>38</sup> the mediators discuss cases at bi-weekly staff meetings. These meetings are very helpful in standardizing procedures and policies, sharing mediation strategies and techniques, and discussing cases and legal theories that bear on many of our cases. This opportunity for collegial re-centering and learning is another advantage of an office the size of ours, which our mediators use and appreciate.

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<sup>35</sup> Rack, *supra* note 25.

<sup>36</sup> Typically, new hires are sent to Harvard Law School's Program of Instruction for Lawyers in Cambridge, Massachusetts.

<sup>37</sup> This Chief Circuit Mediator finds it difficult not to interject questions and comments during the mediations, and new mediators find it difficult not to defer to the new directions those questions and comments can create, thereby yielding control of the overall mediation process.

<sup>38</sup> Mediators periodically attend mediation and substantive legal programs sponsored by the Federal Judicial Center, the American Law Institute—American Bar Association, and others. They also attend bi-annual three-day conferences sponsored by the Federal Judicial Center at which all federal circuit mediators exchange questions and answers, frustrations and successes, techniques and programmatic experiments, and friendship.

## IV. SUPERVISION AND EVALUATION

The appellate courts have almost universally recognized the importance of both the fact and appearance of confidentiality in the mediation functions, and of the need for a wall between the mediators and the court.<sup>39</sup> Most federal circuit mediation offices, like the Sixth Circuit's, are established as independent offices within their courts. Typically they are physically and administratively segregated from the court's decisional processes and personnel,<sup>40</sup> and are funded as separate court units. This need for separation, combined with the nature of mediation work, which involves private, personal interactions between a mediator and the mediation participants, limits opportunities for direct supervision.

We have found four mechanisms for objective supervision of individual mediators' performance: mediation and settlement rates, anecdotal reports from participants, evaluative surveys of participants, and direct observation. Before discussing each of these, two important practical issues should be recognized in connection with supervision. One is that the need for supervision or evaluation of mediators generally can be viewed as less critical than it might be for other professionals and practitioners since the voluntary nature of mediation outcomes reduces the risk that mediator ineptitude or malfeasance can do significant harm to anyone. In the private sector, there is a good argument that consumers in the marketplace will learn how to select good mediators and avoid bad ones, and that large investments in procedures to certify and discipline private mediators is unnecessary.

As courts get more involved in requiring mediation, the picture changes. Courts that require parties to mediate and provide lists of mediators to choose from may feel some responsibility to assure the competence of the mediators on those lists—especially if the parties are paying the mediators. In the case

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<sup>39</sup> The oldest and probably the most frequently cited decision describing the need for and enforcing the requirement of confidentiality in an appellate program is *Lake Utopia Paper v. Connelly Containers, Inc.*, 608 F.2d 928, 930 (2d Cir. 1979). The Sixth Circuit rule provides, "The statements and comments made during the pre-argument mediation process are confidential . . . and shall not be disclosed by the conference judge or the mediation attorney nor by counsel in briefs or argument." 6TH CIR. R. 33(c)(4). In addition, participants are invited at the beginning of every mediation to agree that "no one, including the mediator, may disclose anything that anyone says . . . to any court for any reason." Rare exceptions are recognized for such requirements as Rule 23 class action fairness hearings, but generally the limits on disclosures to this or any other court for adversarial purposes are considered nearly absolute.

<sup>40</sup> In addition to being physically segregated, the Sixth Circuit Mediation Office maintains its own files and computer databases, none of which are accessible to other court personnel.

of court-employed mediators, there are additional considerations. One, of course, is the need to account for the efficacy of spending tax dollars on mediation offices. Another is the need to assure that court mediators are behaving in accordance with the high standards of skill, integrity, and sensitivity to the reputation and image of the judiciary that our society rightfully expects. Court mediators interact with a large number of lawyers and litigants in private, sensitive settings.<sup>41</sup> Even with the promise of confidentiality, court mediators still present themselves as court officials, a role that carries authority at least over the mediation process and the conduct of the participants. Courts that hire staff mediators should be aware of the potential for embarrassment if they select someone whose behavior turns out to deviate significantly from the values and standards of the court.

The Sixth Circuit, like most other federal circuit courts, has delegated the primary supervisory responsibility for its mediation function to the Chief Circuit Mediator. The Chief Circuit Mediator participates in the court's management as one of the "unit heads"—the senior staff of the court.<sup>42</sup> In this capacity, he or she participates in planning for and reporting on the court's administrative business. The Chief Circuit Mediator in the Sixth Circuit reports annually to the court and the public on the number of cases mediated and the number and percentage settled.<sup>43</sup> These reports show office totals, not individual mediator statistics. Periodically the office conducts studies and prepares reports examining more specific questions. For example, studies have examined what types of cases are statistically more likely to settle and how much delay involvement in the mediation process causes in unsettled cases. The Chief Circuit Mediator also periodically makes more detailed and less formal reports to the full court at court meetings. Here, he can describe the procedures and convey the attitudes and values that govern the program's operations and at the same time get input from the court with regard to those values and priorities or any other concerns he or the court might have.

Budget and personnel matters for the Program in the Sixth Circuit, as in all but one of the other circuits,<sup>44</sup> are administered through the Circuit Executive's Office. Circuit executives typically have no case specific responsibilities and so are in a position to assist with most administrative needs or issues pertaining to the mediation offices without risking any breach

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<sup>41</sup> The Sixth Circuit Mediation Office mediates approximately 1000 cases per year, resulting in interactions with approximately 2500 lawyers per year.

<sup>42</sup> Generally, unit heads include the Circuit Executive, the Clerk of the Court, the Senior Staff Attorney, the Chief Circuit Mediator, and the Circuit Librarian.

<sup>43</sup> See SIXTH CIRCUIT COURT OF APPEALS, ANNUAL REPORT 2001 (on file with the Circuit Executive's Office).

<sup>44</sup> Rack, *supra* note 25.

of confidentiality. I keep our Circuit Executive informed of significant activities and issues that arise and seek his counsel regarding most policy questions. Thus, he provides a kind of informal oversight that gives the Judges another source of insight into, and hopefully confidence in, the operations of the program.

Within the mediation office, my own supervision and oversight of the program is closer and more detailed. The mediators all work within a single office suite and communicate with each other daily on an informal basis, often about specific cases and interesting or challenging experiences. In addition, detailed monthly and year-end statistics are circulated within the office showing the number of cases terminated and settled by each mediator. No attempt is made in the Sixth Circuit or any other circuit to connect settlement statistics to mediators' salaries,<sup>45</sup> nor are they directly related to formal performance reviews.<sup>46</sup> There is a kind of administrative paradox in considering settlement the primary goal or product of mediation. On one hand is the fact that settlement is not the only valuable outcome of every mediation. There often are tangible benefits to parties and the Court from our work in cases that never settle, like the clarification of appellate and court procedures for counsel and the reduction of motions.<sup>47</sup> There also are less measurable benefits, like the public relations value to courts that provide a service the public overwhelmingly respects and appreciates.<sup>48</sup> Finally, there

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<sup>45</sup> Salaries are set upon hiring and progress largely by a national formula thereafter.

<sup>46</sup> Only one circuit reports considering settlement rates, among other criteria, in performance reviews of its mediators. Rack, *supra* note 25.

<sup>47</sup> Mediation has been shown to reduce procedural and substantive motions and to clarify issues, perhaps with the additional benefit of streamlining the presentation of the case to the court. The Federal Judicial Center's evaluation of the Sixth Circuit's program found 14.5% fewer procedural motions and 21.6% fewer substantive motions filed in mediated cases as compared to unmediated cases. EAGLIN, *supra* note 4, at 8-9. Additionally, 85% of the attorneys surveyed in all mediated cases said that the program provides assistance to counsel in complying with procedures of the court, 77% said the conferences helped to clarify or eliminate issues, and 57% reported a net savings in the amount of time they were required to spend on their appeal as a result of the conference procedure. *Id.* at 57. Finally, there may be some value to the parties in just knowing a case cannot be settled. To that end, 80% of the attorneys surveyed indicated that, in the absence of the pre-argument program, they would not have taken the initiative to approach the opposing side about settlement. *Id.* at 8-9.

<sup>48</sup> "Fairness" and "perceptions of procedural justice" ratings are high in virtually all studies. Craig A. McEwen & Roselle L. Wissler, *Finding Out if It Is True: Comparing Mediation and Negotiation Through Research*, 2002 J. DISP. RESOL. (forthcoming 2002) (manuscript at 11-12 nn.55-58, on file with author). Similarly, in the Federal Judicial Center evaluation of the Sixth Circuit program, eighty-four percent of the survey respondents who had been through Sixth Circuit appeals both with and without mediation, said they preferred program involvement. EAGLIN, *supra* note 4, at 9.

is an obvious risk that tying employment security and pay directly to settlements could encourage tactics that try to force settlements. On the other hand, the program was created and is expected to settle cases; our primary cost justification to Congress and court budget managers must be related to case terminations, that is, settlements.

By hiring self-motivated professionals, the need for close supervision and traditional pay incentives to externally motivate mediator performance is minimized. Individuals' desire to perform well and to maintain the respect of their colleagues and peers seems to be motivation enough. Indeed, the open reporting within this office of each individual's monthly statistics creates more than enough friendly competition for most of us, and I suspect most mediators, despite what they might say, feel as though they have failed at least to some extent when their cases go to impasse.

A second mechanism for supervision is anecdotal reports, positive and negative, from participants. The chief circuit mediators are commonly called upon to speak at various bar functions and appellate practice seminars about the workings of their programs. They and other senior court staff also typically attend circuit judicial conferences that include members of the bar who practice in their courts. These and other such events provide opportunities to hear informally from lawyers about their experience with the programs. Similarly, judges hear from their friends in the legal community about their mediation experiences. While not sufficient in themselves, these reports direct my attention to problems and exemplary performance. I suspect they are the primary basis for many judges' opinions about the quality of our work.

The third of the evaluative mechanisms we have employed in this program is the questionnaire or survey of lawyers after their participation in our mediations. Every five years or so, the court sends out questionnaires to all of the lawyers in cases recently terminated from the mediation program with or without settlement.<sup>49</sup> While imprecise as a measure of individual mediator performance,<sup>50</sup> these surveys have been very instrumental in shaping the policies and practices of the program and of individual mediators. Our decisions to use telephone conferences and not to require

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<sup>49</sup> The questionnaires, which this office prepares, are color coded to each mediator and sent with a cover letter from the Circuit Executive requesting the lawyers' feedback on the Program's practices. Addressed, stamped envelopes are included so attorneys can easily return the surveys to the Circuit Executive's Office, where identifying envelopes are removed to assure anonymity. Return rates have always equaled or exceeded sixty percent.

<sup>50</sup> One major limitation on the usefulness of the surveys to measure or compare individual mediators' performance is that respondents often appear to blend their previous Sixth Circuit mediation experiences into their answers about the specific case being surveyed.

client participation in initial conferences, for example, grew out of early survey preferences. Similarly, the balance each mediator strikes between evaluation and facilitation in mediation styles, the amount of persistence employed in encouraging changes in parties' positions, and the high importance placed on confidentiality were all influenced by questionnaire feedback. Perhaps what has made these questionnaires most valuable to this court as a supervisory mechanism is that the Circuit Executive can read them as they pass through his office. If my evaluations and reports from these surveys could be tainted by my obvious direct interest, that is not true of the Circuit Executive. His neutral affirmation of the positive nature of the responses provides informal but undoubtedly valuable assurance to the court that we are operating responsibly and with favor among the bar of the circuit.

Our last survey was our most aggressive effort yet to gain mediator-specific and skill-specific evaluative feedback. Approximately 700 questionnaires (sixty percent) were returned from those mailed to counsel participating in mediations of all cases concluded between August 2000 and February 2001. This survey sought detailed appraisal of specific skills and practices for each mediator.<sup>51</sup> The results, while not yet formally evaluated, appear to be mixed in their usefulness as a mechanism for supervision since the degree of distinction between mediators and between skills appears to be fairly low.<sup>52</sup>

Direct observation of a mediator at work may be the surest way to appraise his or her performance. What better way can there be to identify a mediator's style and skillfulness than to directly observe all the dynamics and interactions of a live mediation? Unfortunately, this method is a bit awkward and intrusive and is still subject to the problem of finding agreement on what the measures of good performance should be.<sup>53</sup> While I rarely sit in on an entire mediation of another mediator, I do overhear parts of mediations and

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<sup>51</sup> The five-page survey asked, among other things, for "skillfulness" ratings for the mediators' performance in (a) reducing tensions between the participants; (b) helping participants objectively evaluate the strengths and weaknesses of their arguments and appraise the settlement value of the case; (c) identifying parties' underlying and/or unexpressed interests, motivations, and concerns; (d) uncovering previously unexpressed flexibility and willingness to compromise; (e) generating new ideas and options for settlement; (f) overcoming obstacles and impasses in the negotiations; and (g) guiding the negotiating process. *Id.*

<sup>52</sup> While not yet evaluated for statistical significance, the numerical differences in ratings between mediators and between performance categories for the same mediator appear to this Author's untrained eye to be slight and relatively unpatterned. We hope to have the surveys professionally evaluated this year.

<sup>53</sup> For example, how should a mediator be judged who clearly displays impatience, or even what a sensitive observer might consider rudeness, if the participants do not seem to mind and the case settles? *See* discussion *infra* pp. 624–25.

commonly discuss specifics of individual cases so that I feel well-informed about each mediator's style and performance. Reviewing videotapes of mediations might be a solution to the problems of a reviewer's intrusive physical presence. It could also serve as a useful training device. This is something we plan to try in the near future.

Only rarely have our mediation conferences been observed by people outside the office, and never by sitting judges of this court.<sup>54</sup> Several current Sixth Circuit and district court judges participated in mediations as lawyers prior to their appointment to the bench. Judges from other circuits and state appellate courts have observed our mediations while considering whether to start programs of their own, and new mediators hired to implement new programs also visit and observe conferences. No matter how much prior explanation they receive, the response of nearly all observers is "aha" as they see the theory put into practice.

The logistical difficulties of supervising the confidential work of individual mediators is not the only challenge facing courts and mediation program administrators. Identifying measurable evaluation criteria is an even bigger problem. As explained above, measuring a mediator's quality or value to the parties or to the court by settlements alone is neither adequate nor wise. Moreover, even counting settlements to measure docket reduction can be misleading. In our work at the Sixth Circuit, we are always struggling to discern when "no" really means no, and when it is finally time for the mediator to stop calling the parties with new suggestions in hopes of finding a way around an apparent impasse and give up. Persistence will pay off in many cases, but it is nearly impossible to know in advance which cases will respond to that one more call or suggestion. Participants express appreciation for our persistence as long as it is not bullying, and they are positively effusive when that persistence results in a settlement they thought was impossible. Perhaps a mediator should get extra points for settling "impossible" cases just for the public relations value those settlements provide to the program and the court. In fact, these "impossible" settlements might actually be more valuable in terms of docket relief than other cases. Consider the productivity of two hypothetical mediators working in a court that has a normal attrition rate of twenty percent—that is, an unidentifiable twenty percent of the cases eventually will terminate with or without a mediator's intervention. If, over a six month period, mediator "A" mediates 100 cases and settles forty of them, and mediator "B" mediates 150 cases and

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<sup>54</sup> At the request of the late Chief Judge George Edwards, during the first two years of the program, eight judges of this court conducted mediations in civil cases that I selected. This allowed our judges to see first hand how an appellate mediation might be conducted and allowed me to observe different styles and approaches. As planned, after the first two years of the program, the direct involvement of judges was almost entirely discontinued.



settles forty-five of them, which is more productive? Arguably, mediator "A," though reporting fewer settlements, has had more impact on the docket by settling five more cases that would not have terminated anyway.<sup>55</sup>

Finally, in the absence of formal surveys, participant complaints might be thought of as a measure for performance. Unfortunately, the absence of complaints may not be very useful. Historically, complaints to this court of which I am aware have been rare, maybe a half dozen in twenty years. Most of these were directed to me, not to judges. Also, participant satisfaction levels, regardless of the style or background of the mediators, have been consistently high.<sup>56</sup> Perhaps this can be expected to change as lawyers and clients gain experience with mediation and mediators, and their ability to make comparisons grows. Even with more experience, however, it seems doubtful that lawyers will ever be likely to complain to courts about mere relative ineffectiveness of an individual mediator. Thus, while the presence of complaints might well be indicative of problematic performance, the absence of them probably cannot be relied upon as demonstrating superior performance.

If the difficulties in evaluating court mediators seem daunting, it is worth remembering that a similar problem has always existed in the selection and retention of judges. Despite this, we manage to maintain fairly high expectations and, hopefully, standards for our state and federal judiciary. It seems unlikely that agreement could be reached to evaluate judges strictly by the number of trials they conduct, or appeals of their rulings, or even reversals on appeal. Our highest expectations are more qualitative than quantitative and are difficult to measure.

No matter how carefully courts select staff mediators, it seems inevitable that mistakes will be made. Fortunately, these are not lifetime appointments and courts need not live forever with poor choices. Perhaps courts should subject their mediators to a periodic review and reappointment process similar to the federal court procedures for reappointing magistrate and bankruptcy judges—a process not unlike bar association ratings of state court judicial candidates. A committee of people who have regular dealings with the court, or who represent people who do, could be assembled every eight

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<sup>55</sup> This office has always counted and reported both the number of cases mediated and the number and percentage of cases settled.

<sup>56</sup> McEwen & Wissler, *supra* note 48. Also, Roselle Wissler reports findings from Ohio survey data that the one mediator characteristic that lead parties to feel that the mediation process was less fair was whether the mediator pushed a particular settlement. See Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know From Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 661–63 (2002). Otherwise, approval ratings were generally high across all other mediator variables such as experience, training, and subject matter expertise. See *id.*

years or so and asked to evaluate the mediator according to qualities the court thinks important. This could be a healthy process for all involved.

## V. CONCLUSION

The difficulty of evaluating mediators generally is gaining attention in the national debates over credentialing and the best way to assure mediator competence and quality.<sup>57</sup> For courts, the problem usually arises in the context of wanting to assure at least minimum standards of competence and quality of outside mediators to whom they refer litigants in pending cases. Sadly, this Author thinks most attempts to formally credential volunteer or private mediators at this time will accomplish little more than restricting entry into the field since, as stated earlier, there are no objective selection criteria proven to assure superior quality or effectiveness in mediators. While there are challenges to evaluating court staff mediators as well, courts that choose to employ their own mediators have a much greater opportunity to control the availability, as well as the style and quality of mediation provided to the public they serve.

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<sup>57</sup> The Fall 2001 edition of *Dispute Resolution Magazine* devotes several articles to this topic. DISP. RESOL. MAG., Fall 2001, at 3–21 (2001).